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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 212

CRANE COMPANY,

Petitioner;

v.

WESTINGHOUSE AIR BRAKE COMPANY, A. KING McCORD, EDWARD J. HANLEY, EDWIN HODGE, JR., FRANK L. MAGEE, JOHN A. MAYER, G. ALBERT SHOEMAKER, ERIC L. WALKER, LAWRENCE E. WALKLEY, JAY V. WILCOX, LESLIE B. WORTHINGTON, AMERICAN STANDARD and BLYTH & CO.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT AMERICAN STANDARD INC. IN OPPOSITION

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This brief, responsive to the petition for certiorari filed by Crane Company ("Crane") on June 2, 1970, is submitted on behalf of American Standard Inc. ("Standard") as successor in interest of Westinghouse Air Brake Company ("Air Brake"). Air Brake, which was a defendant in the District Court and is designated by Crane as a respondent here, was merged into Standard on June 7, 1968 and no longer exists as a separate entity.*

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* Blyth & Co., which Crane also names as a respondent, was not a party to this case below although it was a defendant in a separate action that was consolidated with the present case in the District Court. We have been authorized to advise the Court that Blyth & Co. does not join in this Brief in Opposition because Crane's petition charges it with no offense and seeks no relief against it.

Jurisdiction

Crane's petition is untimely. The judgment of the Court of Appeals, which covers two separate lawsuits that were consolidated in the District Court, was entered December 10, 1969 and the petition was filed with this Court on June 2, 1970, long after the expiration of the 90-day period prescribed by 28 U.S.C. § 2101(c).

Crane's time cannot be deemed to have been extended by the filing of Standard's petition for rehearing in the Court of Appeals, which was denied on March 4, 1970, because Standard's rehearing petition was addressed solely to a separate case involving Crane's claim of "market manipulation" against Standard and Blyth & Co. ("Blyth"); it in no way concerned Crane's proxy-statement case against Air Brake and its directors, which is the subject matter of the present petition for certiorari.

The separateness of these two claims is pointed up by the fact that they derive from different lawsuits brought under different complaints by different counsel against entirely different sets of defendants—the manipulation claim against Standard and Blyth (R. 58, S.D.N.Y. No. 68 Civ. 1845), and the proxy-statement claim against Air Brake and its directors (R. 1, S.D.N.Y. No. 68 Civ. 1560). Although consolidated in the District Court as a matter of convenience and economy, the two cases were not merged into a single cause, but retained their separate docket numbers and separate identities in both the District Court and the Court of Appeals,* and are still to be regarded as separate actions. See

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* The proxy-statement case was given Docket Nos. 32569 and 32570 in the Court of Appeals, and the "manipulation" case was given Nos. 32571 and 32572. The double numbers reflect the fact that

Johnson v. *Manhattan Ry.*, 289 U.S. 479, 496-97 (1933); *Zdanok* v. *Glidden Co.*, 327 F.2d 944, 950 n.6 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); *Abrams* v. *Occidental Petroleum Corp.*, 44 F.R.D. 543, 547 (S.D.N.Y. 1968).

Since Crane did not seek rehearing in the Court of Appeals with respect to the proxy-statement case against Air Brake and its directors (No. 68 Civ. 1560), the Court of Appeals would not have disturbed its decision in that case even if rehearing had been granted in the "manipulation" case against Standard and Blyth (No. 68 Civ. 1845). Accordingly, the Court of Appeals' judgment, insofar as it relates to the proxy-statement case (No. 68 Civ. 1560), became final more than five months before the present petition was filed. The present petition is therefore out of time.

As this Court pointed out in *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 213 (1952), the statutes limiting this Court's appellate jurisdiction "are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review." See STERN & GRESSMAN, SUPREME COURT PRACTICE § 6.4 (4th ed. 1969).

Questions Presented

We do not agree that Questions 1 and 2 set forth in Crane's petition are properly presented. They rest on factual allegations that both of the lower Courts rejected.

Crane appealed from the District Court's order denying a preliminary injunction as well as from the final judgment dismissing these actions on the merits.

In the Courts below Crane contended that the proxy statement used by Air Brake in support of the proposed merger of Air Brake and Standard was "false and misleading" because it allegedly failed to disclose, *inter alia*, that the Air Brake directors recommended the merger for the purpose of preventing Crane itself from acquiring control of Air Brake and insuring the continuation of the existing Air Brake management. After a full trial on the merits, the District Court ruled in favor of Air Brake, holding that the evidence did not support Crane's charge that this was the reason for the merger recommendation, that there was no evidence that the Air Brake directors acted out of improper motives, that all of the facts from which Crane erroneously deduced improper motives were fully set forth in the proxy statement and that Crane's other charges of omissions and misstatements in the proxy statement were "without substance" (App. B of Petition, pp. 41a-42a, 46a-47a). The Court of Appeals, after reviewing the extensive evidence relating to these claims, affirmed.

In view of the adverse decision by both of the Courts below, it is understandable that Crane does not ask this Court to review again its twice-rejected factual contentions, which involve voluminous and complex evidence thoroughly explored in the Courts below. Nevertheless, in its petition for certiorari Crane asks this Court to determine whether a "purpose of preventing a takeover" and the existence of supposedly "reliable information" unfavorable to the proposed merger are "material" facts requiring disclosure under SEC Rule 14a-9, 17 C.F.R. § 240.14a-9. Since both of the Courts below properly rejected Crane's factual allegations as being unsupported by the evidence, and since Crane does not ask this Court to overturn those factual

determinations, the materiality of the unsubstantiated "facts" set forth in Crane's petition is a purely hypothetical question not properly presented to this Court for review.

In Question 3 of its petition Crane seeks to raise an issue that was not set forth in the pleadings in this action and that was not discussed by the Court of Appeals in its opinion. Moreover, Question 3 fairly comprises the subsidiary and antecedent question whether Standard "artificially inflated the market price of [Air Brake] stock by manipulative wash sales," a question that Standard wishes to brief and argue in the event certiorari is granted. However, the issue of "manipulation", while not squarely raised in the case presently before this Court, is the subject of the separate action (No. 68 Civ. 1845) that the Court of Appeals has remanded to the District Court for further proceedings. Inasmuch as the entire issue of manipulation will be subject to later review by this Court in the other case after conclusion of the remanded proceedings and after receipt of further evidence, the issue of manipulation is not ripe for this Court's consideration at this time and on this record.

Statement

This litigation arises out of an attempt by Crane to force a takeover of Air Brake.

On March 4, 1968 Air Brake publicly announced that it had entered an agreement to merge with Standard, subject to the approval of the Air Brake stockholders at a meeting to be held on May 16. The merger agreement was the culmination of lengthy study and negotiation by the Air

Brake management, as the record abundantly shows* and as the Court of Appeals recounted in its opinion (App. A of Petition, pp. 26a-30a). Some months before, the Air Brake management had rejected a merger proposal by Crane, in part at least because of dissatisfaction with the quality of the Crane management (Ex. 25A, pp. 83-84), but notwithstanding the rebuff, Crane not only retained the substantial block of Air Brake stock it had secretly accumulated (it held nearly 10% of the outstanding stock by mid-January) but proceeded to make substantial additional purchases—first on the stock exchange and later through a public tender offer—and at the same time it sought by a variety of means to frustrate Air Brake's prospective merger with Standard. All of its efforts failed. At the May 16 meeting of the Air Brake stockholders, the Air Brake stockholders voted overwhelmingly in favor of the merger. Very few Air Brake shares other than the 32% controlled by Crane itself were voted against the merger, which became effective on June 7, 1968. Within a week after the merger Crane disposed of all but a token part of its former Air Brake holdings in a record-breaking stockmarket transaction in which it realized a gross cash profit of more than $10 million. There is pending in the District Court an action by Standard to recover part of this profit under the short-swing trading provisions of Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b).

The present petition arises out of a civil action begun by Crane on April 17, 1968 in the Southern District of New York (No. 68 Civ. 1560) in an attempt to enjoin Air Brake

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* See, *e.g.*, Ex. 25-A, pp. 119-123; Ex. 25-B, pp. 225-226, 236, 239, 242-243, 249, 251-256, 259-260, 279-289; Ex. 25-C, pp. 316, 353, 358, 366.

and its directors from soliciting and voting proxies in favor of the merger at the May 16 stockholders' meeting. In its complaint Crane charged that the Air Brake proxy statement violated Sections 14(a) and 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78n(a), 78j(b), in that it failed to "set forth a full, fair and complete statement of all the facts and circumstances leading to the making of the merger agreement with Standard," including "the actual reasons for the merger" (R. 1, par. 15). On May 6, 1968 Crane commenced a second action in the same Court (No. 68 Civ. 1845) in which it charged Standard and Blyth (Standard's financial advisor) with "vote-buying" and "market manipulation" with respect to Air Brake stock. These two actions were subsequently consolidated and tried together.

The trial began on May 21 and, with minor interruptions, continued until June 3. At the conclusion of the trial the District Court (which denied Crane's motion for a preliminary injunction on May 31) dismissed both of Crane's actions after delivering an opinion in which the following findings, among others, were made:

> (a) Crane failed to prove that the reason why the Air Brake management recommended the merger was to forestall Crane from acquiring control of Air Brake and to ensure the continuance of Air Brake's management. (App. B of Petition, p. 41a)
>
> (b) There was no evidence of improper motives on the part of Air Brake's management in recommending the merger with Standard. (*Id.*, p. 47a)
>
> (c) Crane's attempted takeover of Air Brake and the expectation that Air Brake's management would continue to be employed after the merger were clearly

set forth in Air Brake's proxy statement. (*Id.*, pp. 41a-42a)

(d) All of the facts from which Crane erroneously deduces improper motives were fully disclosed to Air Brake's stockholders. (*Id.*, p. 42a).

The Court of Appeals unanimously affirmed the District Court with respect to the proxy-statement case (No. 68 Civ. 1560), holding that "the relevant facts were fairly stated in the proxy statement" (App. A of Petition, p. 29a) and that:

(a) The proxy statement accurately reported that the Air Brake directors had given due consideration to the merger. (*Id.*, pp. 26a-29a)

(b) Crane's allegations did not establish that the Air Brake directors had practiced a deception upon the corporation or that they had failed to exercise the care required of them as fiduciaries. (*Id.*, pp. 28a-29a)

(c) The Air Brake directors were not without a reasonable basis in fact for recommending the merger with Standard. (*Id.*, p. 29a)

(d) There were no improper motives underlying the action of the Air Brake directors, and the proxy statement fairly set forth the facts regarding the proposed merger, including the fact that the directors opposed the Crane takeover and that certain Air Brake personnel would be employed after the merger. (*Ibid.*)

(e) The Air Brake directors did not breach their duty of disclosure with regard to the proxy statement. (*Id.*, p. 30a)

Crane filed no petition for rehearing of this decision affirming the dismissal of the proxy-statement complaint.

In the same opinion, the Court of Appeals reversed the "manipulation" case (No. 68 Civ. 1845), holding that

Standard's transactions in Air Brake stock on one day, April 19, violated Sections 9(a) and 10(b) of the Securities Exchange Act, 15 U.S.C. §§ 78i(a), 78j(b), and remanding the case to the District Court for further proceedings. Upon the remand, Crane has formally advised the District Court that it seeks not only compensatory and punitive damages, but "divestiture or separation of Air Brake from Standard", presumably the same relief that Crane seeks by means of the proxy-statement claim it asks this Court to review.

Argument

I.

The chief reason advanced by Crane in support of the petition for certiorari is the asserted conflict between a statement made by the Court below and what amounts to a dictum in this Court's subsequent opinion in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). In its decision below, the Court of Appeals referred to a "material fact" as a fact "that would influence the stockholders to act differently if disclosed" (App. A of Petition, p. 30a). In the *Mills* case this Court said that "where a misstatement or omission in a proxy statement has been shown to be 'material,' . . . that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote." 396 U.S. at 384.

It is perfectly clear that nothing in either the present case or *Mills* hinges on the nice distinction Crane professes to find in these phrases.

In *Mills* this Court decided what causal relationship must be shown between a materially false proxy statement and the resulting merger in order for a cause of action to be established (396 U.S. at 377); the lower courts had already found that the proxy statement in question was materially misleading, and this Court specifically refused to review that determination (396 U.S. at 381 n.4). In the present case both the Court of Appeals and the District Court treated the proxy statement issues as primarily issues of fact, and based their decision on the evaluation of voluminous and complex evidence developed during extended trial and pretrial proceedings. Since the Courts below found no false statements or omissions in the Air Brake proxy statement, they had no question of materiality before them.

II.

The principal "facts" on which Crane relies in its petititon are not facts at all but mere allegations that the Courts below properly rejected as unsupported by the evidence. The cornerstone of Crane's complaint was the charge that the Air Brake directors had agreed to the Standard merger in order to avert a takeover by Crane, and that this alleged purpose had been wrongfully omitted from the proxy statement. Crane's petition, on virtually every page, repeats this allegation as though it were a fact that has been established, and not once does it disclose that far from being an established fact it is nothing more than an allegation that has been squarely rejected by both Courts below. The District Court explicitly ruled that this allegation had not been proved:

> "I come to the charges of falsity in the proxy statement made against Air Brake. It is charged, first, that the Air Brake management failed to disclose that one of the reasons, if not the sole reason, for Air Brake's recommendation of the American Standard merger was to forestall Crane from acquiring control of Air Brake and to insure the continuance of Air Brake's present management.
>
> "The defendant Air Brake has denied that this was the reason for the recommendation, and plaintiff has failed to establish its contention to the contrary." (App. B of Petition, p. 41a)

The findings that there were no false statements or omissions in the Air Brake proxy statement, explicitly affirmed by the Court of Appeals (App. A at Petition, pp. 20a-30a), means that there is no genuine issue of materiality presented to this Court.

III.

Crane's other objections to the proxy statement, advanced in Question 2(ii) of the petition, were found by the District Court to be "without substance" (App. B of Petition, p. 46a). The Court of Appeals, after detailed advertance to financial statements, text of the proxy statement and underlying evidence, likewise rejected the claims of misleading statements or omissions in the proxy statement. (App. A of Petition, pp. 20a-30a).

It is clear from the opinions of the Courts below that their findings of fact based on a lengthy record were dispositive of Crane's proxy statement claims. Consequently, this Court would have to overturn the uniform factual findings of the two lower Courts before ever reaching the artificial issue of law that Crane's petition seeks to create.

IV.

There are further considerations applicable to Crane's contention that the alleged "market manipulation" should have been disclosed in Air Brake's proxy statement. In fact, there has not yet been a definitive determination of whether there was a manipulation at all—a complex issue of fact and law as to which the Courts below were in disagreement. The Court of Appeals has remanded the "manipulation" case against Standard and Blyth (No. 68 Civ. 1845) to the District Court for further proceedings, including the determination of the crucial question of what effect, if any, the alleged manipulation may have had. Standard strongly controverts the Court of Appeals' decision in the "manipulation" case, and of course the issue of manipulation, after completion of all proceedings below, will be subject to review by this Court on the completed record and in light of the remedies, if any, that the District Court has decreed in that case. The correctness of the Court of Appeals' ruling on manipulation is of course antecedent to the question, tendered by Crane's petition, whether the alleged "manipulation" should have been disclosed in the Air Brake proxy statement.

In these circumstances we submit that the manipulation issue is not ripe for review on this record or at this time.

CONCLUSION

For the foregoing reasons Crane's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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